

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL DAYNE BRIDGEMAN,

Civil No. 10-2679 LAB (NLS)

Petitioner,

V.

MICHAEL T. SMYTH, Warden

Respondent.

ORDER DISMISSING CASE WITHOUT PREJUDICE

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254.

FAILURE TO NAME PROPER RESPONDENT

Review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to

1 name a proper respondent. See id.

2 The warden is the typical respondent. However, “the rules following section 2254 do not
 3 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the

4 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal

5 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a

6 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall

7 be the state officer who has official custody of the petitioner (for example, the warden of the

8 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

9 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
 10 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
 11 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.
 12 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
 13 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
 14 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
 15 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d
 16 at 895.

17 Here, Petitioner has incorrectly named “JUDGE, COMM, TEMP, Michael T. Smyth,”
 18 as Respondent.

19 In order for this Court to entertain the Petition filed in this action, Petitioner must name
 20 the warden in charge of the state correctional facility in which Petitioner is presently confined
 21 or the Director of the California Department of Corrections. Brittingham v. United States, 982
 22 F.2d 378, 379 (9th Cir. 1992) (per curiam).

23 **FAILURE TO STATE GROUNDS FOR RELIEF IN PETITION**

24 In addition, Rule 2(c) of the Rules Governing Section 2254 Cases states that the petition
 25 “shall set forth in summary form the facts supporting each of the grounds . . . specified [in the
 26 petition].” Rule 2(c), 28 U.S.C. foll. § 2254. *See also Boehme v. Maxwell*, 423 F.2d 1056, 1058
 27 (9th Cir. 1970) (trial court’s dismissal of federal habeas proceeding affirmed where petitioner
 28 made conclusory allegations instead of factual allegations showing that he was entitled to relief).

1 Here, Petitioner has violated Rule 2(c). Although Petitioner does not fail to state generalized
 2 constitutional grounds for relief, he does fails to provide specific factual allegations in support
 3 of such grounds.

4 While courts should liberally interpret pro se pleadings with leniency and understanding,
 5 this should not place on the reviewing court the entire onus of ferreting out grounds for relief.
 6 *Zichko v. Idaho*, 247 F.3d 1015, 1020-21 (9th Cir. 2001). The Court finds that the Petition contains
 7 conclusory allegations without any specific facts in support of relief. A federal court may not
 8 entertain a petition that contains allegations which are conclusory.

9 This Court would have to engage in a tenuous analysis in order to attempt to identify and
 10 make sense of the Petition. In order to satisfy Rule 2(c), Petitioner must point to a “real
 11 possibility of constitutional error.” *Cf. Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977)
 12 (internal quotation marks omitted). Facts must be stated, in the petition, with sufficient detail
 13 to enable the Court to determine, from the face of the petition, whether further habeas corpus
 14 review is warranted. *Adams v. Armontrout*, 897 F.2d 332, 334 (8th Cir. 1990). Moreover, the
 15 allegations should be sufficiently specific to permit the respondent to assert appropriate
 16 objections and defenses. *Harris v. Allen*, 739 F. Supp. 564, 565 (W.D. Okla. 1989). Here, the
 17 lack of grounds for relief in the Petition prevents the Respondent from being able to assert
 18 appropriate objections and defenses.

19 Due to Petitioner’s unsatisfactory showing, the Court dismisses the action without
 20 prejudice. Should Petitioner decide to file a new petition, he is advised to *clearly and succinctly*
 21 state all grounds for relief using the First Amended Petition form sent to Petitioner with this
 22 order.

23 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

24 Further, habeas petitioners who wish to challenge either their state court conviction or the
 25 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
 26 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial
 27 remedies, a California state prisoner must present the California Supreme Court with a fair
 28 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28

1 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court
 2 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
 3 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
 4 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
 5 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
 6 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
 7 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
 8 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
 9 in federal court, but in state court.” Id. at 366 (emphasis added).

10 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
 11 Supreme Court. In fact, he specifically indicates he did not seek review in the California
 12 Supreme Court. (See Pet. at 6.) If Petitioner has raised his claims in the California Supreme
 13 Court he must so specify. “The burden of proving that a claim has been exhausted lies with the
 14 petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d
 15 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v.
 16 Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

17 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 18 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 19 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation
 20 period shall run from the latest of:

21 (A) the date on which the judgment became final by the
 22 conclusion of direct review or the expiration of the time for seeking
 such review;

23 (B) the date on which the impediment to filing an application
 24 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

25 (C) the date on which the constitutional right asserted was
 26 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 applicable to cases on collateral review; or

28 (D) the date on which the factual predicate of the claim or
 claims presented could have been discovered through the exercise

of due diligence.

² || 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

The statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

10 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
11 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
12 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
13 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
14 habeas relief because he has not alleged exhaustion of state court remedies.

CONCLUSION AND ORDER

16 Accordingly, the Court **DISMISSES** the Petition without prejudice due to Petitioner's
17 failure to satisfy the filing fee requirement, name a proper respondent, state grounds for relief
18 in the Petition, and allege exhaustion of state judicial remedies. To have this case reopened,
19 Petitioner must either pay the \$5 filing fee or submit adequate proof of his inability to pay the
20 fee, AND a file a First Amended Petition which cures the pleading deficiencies noted above,
21 along with a copy of this Order **no later than March 8, 2011.** *The Clerk of Court is directed*
22 *to send Petitioner a blank Southern District of California In Forma Pauperis Application and*
23 *a blank First Amended Petition form along with a copy of this Order.*

IT IS SO ORDERED.

25 | DATED: January 4, 2011

Larry A. Bumgarner

HONORABLE LARRY ALAN BURNS
United States District Judge